APR 24
MICHAEL RODAK,

No. 73-1592

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

CHARLES K. NICKELLS and
WILLIAM T. PALLIS,
Petitioners.

v.

STATE OF WASHINGTON,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION III

Respectfully submitted,
GEOFFREY A. WILSON

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FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

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CHARLES K. NICKELLS and
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v.

STATE OF WASHINGTON,
Respondent,

Charles K. Nickells and William T. Pallis, petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above case on January 24, 1974.

OPINION BELOW

The opinion of the Court of Appeals of the State of Washington, Division III (printed in Appendix A hereto, infra, pursuant to the provisions of Rule 23 (i) of this court) was unreported.

JURISDICTION

The Court of Appeals of the State of Washington, Division III, in an opinion filed September 26, 1973, affirmed the judgment of the trial court. Timely motion for rehearing was filed by petitioners and was denied on November 8, 1973. Petitioners thereupon filed a timely petition for review in the Supreme Court of the State of Washington and this petition was denied on January 24, 1974 and entered on January 25, 1974.

This petition for writ of certiorari is filed less than ninety days after the denial of the petition for review.

The petitioners invoke the jurisdiction of this court under the provisions of 28 U.S.C., Sec. 1257(3) and United States Supreme Court Rule 19(1) (a).

QUESTION PRESENTED

1. Did not the Court of Appeals of the State of Washington, Division III, after assuming arguendo that certain objected to evidence was improperly admitted at trial, erroneously rule that the error was harmless?

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment IV:

(In pertinent part) The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .

United States Constitution, Amendment XIV:

(In pertinent part) . . . (N)or shall any State deprive any person of life, liberty or property, without due process of law; . . .

STATEMENT OF THE CASE

1. Proceedings below.

A motion to suppress all real and testimonial evidence obtained subsequent to the detention of the petitioners and the search of their persons and the motor vehicle in which they were riding was filed October 13, 1971. This motion

was heard by the Superior Court of Grant County on October 18-19, 1971, and denied, an order for such denial being entered at that time. Petitioners were tried by a jury in the Grant County Superior Court on January 27-28, 1972, the result of which was a verdict of guilty as to each petitioner on each count. Judgment and order appealed from were entered on March 10, 1972. Petitioners were each sentenced to a maximum term of not more than five years imprisonment on each of the two counts, the sentences to run concurrently.

Petitioners filed timely appeal to the Court of Appeals of the State of Washington, Division III, raising all appropriate issues and in an opinion filed September 26, 1973, the judgment of the trial court was affirmed. Timely motion for rehearing was filed by petitioners and was denied on November 8, 1973. Petitioners thereupon filed a timely petition for review in the Supreme Court of the State of Washington, and this petition was denied on January 24, 1974. The cause was remitted to the Superior Court of Grant County on January 25, 1974.

Petitioners made application for a stay of execution to allow them to remain free on bond to the Court of Appeals of the State of Washington, Division III, which was denied on February 19, 1974. On March 20, 1974, Mr. Justice Douglas signed an order staying the execution and enforcement of the judgment and sentence of the Superior Court of the State of Washington for Grant County pending the timely filing and disposition of a petition for a writ of certiorari.

2. Statement of Facts.

A music festival called "Sunrise 71" was scheduled to be held in Grant County, Washington the weekend of June 18-20, 1971. Shortly before its scheduled opening, 200 men from sheriffs' offices across the state moved in to the area to enforce a court order enjoining the promoters of the festival from proceeding. Those persons who arrived at the festival area were prevented from entering and many, including the petitioners, were directed to a nearby state park at Sunlakes to camp. The petitioners on the day of June 18, set up camp and spent the rest of the day at various activities.

The state called two officers who testified that they ap-

proached petitioner Pallis between 7:00 and 9:00 p.m. on the night of June 18 and asked to purchase some "mescaline". They stated they returned at approximately 2:30 a.m. to the camp site and each purchased twenty small brown tablets from petitioner Nickells. The officers each paid Mr. Nickells for the tablets with one $20 bill and one $5 bill, the serial numbers of which had been previously recorded.

On the morning of June 19 a large number of armed police entered the park and ordered everyone out of the park. At approximately 11:00 a.m. as petitioners and two other individuals who were riding in the truck reached the exit of the park, they were stopped by police officers. The truck was moved to a different area and subsequently the objected to search of petitioners and the truck was carried out. The search of the truck was without a warrant, and though Mr. Nickells was arrested at that time Petitioner Pallis and two other adults were released and could have driven the truck away. Over $1,200 in currency was seized, including the above mentioned "marked" bills. Witnesses for the state testified at trial that small brown pills, similar to the ones allegedly purchased by the two officers, were found inside the truck and one officer testified that he personally found a small container of similar pills on the person of petitioner Nickells (though he had earlier testified at a hearing on the motion to suppress, that no drugs were taken from petitioner Nickells' possession when he was searched).

Both petitioners testified at trial and denied the sale of illegal drugs to the two officers. The two other persons in the truck at the time they were stopped corroborated their testimony. On these basic facts, petitioners were tried and convicted.

REASONS COMPELLING ALLOWANCE OF THE WRIT

1. *When a constitutional error is made by the trial judge in a criminal case, the reviewing court must reverse the judgment if there is a reasonable possibility that the evidence complained of might have contributed to the conviction.*

Under common law prior to the enactment of the federal

harmless error statute and similar statutes by state legislatures, any error regardless of its significance, resulted in an automatic reversal of the trial court's decision. A wave of judicial reform in the late 19th and early 20th centuries, was encouraged by the unnecessary burden on the judicial system in forcing the retrial of cases in which the result would be the same after the error had been corrected. Now all state and federal courts are governed by statutes which allow a trial court's verdict to be affirmed on appeal despite the existence of error in the conduct of the trial. *Chapman v. California*, 386 U.S. 18, 48-49 (1967) (Justice Harlan dissenting). See also Note: "*Harmless Constitutional Error*, 20 Stanford L. Rev. 83 (1967).

In 1919 Congress passed a federal harmless error rule: Act of February 26, 1919, Chap. 48, 40 Stat. 1181, repealed 1948, now 28 U.S.C., Sec. 2111 (1964). The result of the new rule and most of the state rules was a case by case determination of whether there was substantial prejudice caused by the error.

In both theory and application, these legislative enactments were ambiguous and the Supreme Court in 1963 sought to clarify the doctrine. In *Fahy v. Connecticut*, 375 U.S. 85 (1963), the court rejected the "substantial prejudice" test and instead narrowed the scope of the inquiry by asking "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" 375 U.S. at 86-7.

This standard promulgated in *Fahy* was further elaborated upon in *Chapman v. California*, 286 U.S. 18 (1967). The United States Supreme Court put the doctrine in traditional criminal burden of proof terms by stating that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24. In its opinion, the Supreme Court criticized the California court's view that an error is not prejudicial if without its contribution, the judgment would still be supported by "overwhelming evidence"—a view that placed an "emphasis and perhaps over-emphasis" on the error free evidence in the case. *Id.* at 23.

In *Fahy* and *Chapman*, the results of the court's ruling in each case was to reverse the opinions of the appellate courts by holding that the effect of the introduction of the objected to evidence was not harmless. Since *Chapman* in 1967, the Supreme Court has had three occasions to elaborate substantially on the harmless error standard of *Fahy* and *Chapman*. *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726 (1969); *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056 (1972); *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174 (1973); see also *Cupp v. Naughten*, 38 L.Ed.2d 368. In the process of deciding these cases, according to some commentators, the United States Supreme Court has brought a halt to the narrowing of the harmless error test from the federal statute through *Fahy* and *Chapman*. See Comment: "*A Multiple Approach to Harmless Constitutional Error*, 18 U.C.L.A. 202 at 205 (1970). It has been argued that though Mr. Justice Douglas writing for the majority in *Harrington* purported to be applying the *Chapman* formulation of harmless error, the test applied appeared different in inquiring only whether the error was harmless in light of the overwhelming amount of evidence.

It is suggested, however, that the standards set down in *Chapman* have not been altered by these recent cases. Although the court stated in *Harrington v. California*, "(The evidence against Harrington) is so overwhelming that unless we say that no violation of *Bruton* (Bruton v. United States, 391 U.S. 123 (1968)) can constitute harmless error, we must leave the state conviction undisturbed" 395 U.S. at 254, Mr. Justice Douglas makes it clear that the amount of untainted evidence against the defendant in any case is merely a factor which must be considered in determining whether a reviewing court can determine beyond a reasonable doubt that the erroneously admitted evidence affected the judgment of the fact finder. As the majority opinion in *Harrington* goes on to state:

> Our judgment must be based on our reading of the record and on what seems to us to have been the

probable impact of (the erroneously admitted evidence) on the minds of an average jury.

395 U.S. at 254

Mr. Justice Douglas emphasizes that the majority intends in *Harrington* to affirm the test of the majority opinion stated in *Chapman*.

Similarly, in *Schneble*, although the court describes the independent, untainted evidence of guilt as overwhelming, and the allegedly inadmissible evidence as insignificant, they state:

(W)e must determine on the basis of our own reading of the record what seems to us to have been the probable impact . . . on the minds of an average jury.

405 U.S. at 432

And in *Milton v. Wainwright*, the majority opinion again reaffirms the Chapman test and states:

Our review of the record, however, leaves us with no reasonable doubt that the jury (at defendant's 1958 trial) would have reached the same verdict without hearing (the officers) testimony.

407 U.S. at 377

See also *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565 at 1570 (1973).

The standard which the reviewing court must apply then in a criminal case in which constitutional error occurred at trial, is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. In making this determination, the reviewing court must study the untainted evidence in the case as well as the magnitude of the error and determine its effect on a reasonable jury. If the reviewing court cannot say that the admission of the objected to evidence had no effect on such a jury, it cannot be considered harmless.

2. *The Court of Appeals of the State of Washington, Division III, applied an improper test in the instant case in*

declaring the admission of the objected to evidence "harmless".

The opinion in the instant case of the Court of Appeals, although citing *Chapman v. California, supra*, confuses the proper standard to apply in determining whether objected to evidence was harmless. The court, after "assuming, arguendo, that the search of the van truck was violative of the Fourth Amendment", (opinion of the Court of Appeals, State of Washington, Division III, Appendix A at 3, hereinafter cited as Opinion) posed the question "does there remain substantial evidence upon which the defendants could be convicted of the crime charged". Opinion at 3. They answer this question by stating:

> The testimony of the two officers showed clearly the purchase of the drugs and the participation of each defendant. *We* are left without doubt that the defendants' guilt was conclusively proven by competent evidence. Opinion at 4 (emphasis supplied)

Chapman, however, made clear and *Harrington, Schneble* and *Milton* reaffirmed that the test is not whether there was substantial evidence to support the defendant's conviction nor is it relevant that the reviewing court is left without doubt about the defendant's guilt. What is important is the effect of the error on the jury. This effect is directly proportional to the significance of the error and indirectly proportional to the significance of the independent, untainted evidence of the prosecution.

3. *Applying the proper test, the admission of the objected to evidence by the trial court in the instant case cannot be considered "harmless".*

The burden of proving constitutional error to be harmless clearly lies on the respondent. As the United States Supreme Court stated in Chapman:

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by

> it the burden to show that it was harmless. It is for that reason that the original common law harmless error rule put the burden on the beneficiary of the error, either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment. There is little, if any, difference between our statement in *Fahy v. State of Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

386 U.S. at 24

Petitioners, in their brief to the Court of Appeals, State of Washington, Division III, concluded a 61 page argument with one half page indicating their belief that the error committed by the state in admitting the objected to evidence was clearly prejudical. The state, in its reply brief, did not contend that the evidence admitted in the instant case was harmless. Instead, it argued that the evidence was properly admitted. In oral argument before the Court of Appeals, no questions were addressed to either the state or petitioners' counsel on the harmless error issue.

It is true that in the instant case there was some independent, untainted evidence of petitioners' guilt. There was testimony by the two officers that they did purchase illegal drugs from the two petitioners. However, the petitioners testified, as did independent witnesses, that they did not deliver the drugs to the agent. The deciding evidence on the issue of guilt was most certainly the evidence obtained during the search of petitioners and the van some 12 hours later. All of this evidence was properly objected to at trial. This evidence included over $1,200 found in the van, a substantial number of LSD tablets similar to the tablets allegedly purchased by the officers, and perhaps most importantly, the "marked" currency the officers had allegedly given to the petitioners in return for the tablets. It is perhaps helpful

to note that of 192 pages of total transcript of the prosecution's case, only 17 pages dealt with the actual negotiations leading up to and the purchase of the narcotics from petitioners, while 154 pages of the transcript described the objected to stop, search and seizure of the van, and the petitioners' persons, and the care, custody and analysis of the erroneously admitted evidence. Of the 18 exhibits offered by the state, 13 were subject to the objection made by petitioners' counsel in his motion to suppress. It cannot possibly be said beyond a reasonable doubt by any reviewing court that the admission of this objected to evidence did not "influence" the jury" or that it had "but very slight effect on their verdict and judgment". See *Kotteakos v. United States*, 328 U.S. 750 at 764 (1946). This is not a case like *Harrington, Schneble* or *Milton*, where the significance of the error is inconsequential and the independent, untainted evidence of guilt overwhelming. The admission of the objected to evidence in the instant case was clearly prejudicial and could reasonably have effected the verdict of the jury.

4. *Because of the ambiguity of the present state of the law regarding the application of the harmless error test, reviewing courts are affirming convictions without reaching the merits of substantial constitutional errors.*

In each of the five cases cited above discussing the harmless error issue which have been decided since *Chapman*, the United States Supreme Court held the objected to error to be harmless. In each of these cases as was discussed above, the Supreme Court affirmed *Chapman* but held that the errors were harmless because the significance of the error was very slight and the independent evidence of guilt great. The result of the emphasis by the Court on "overwhelming" untainted evidence supporting convictions in these cases has resulted in a mistaken belief by reviewing courts of the state that they should only look to the amount of untainted evidence in determining whether an error was harmless. As was seen above, the proper approach required by all of the Supreme Court cases from *Chapman* on requires the reviewing court to determine the probable effect on a reasonable jury of the

objected to evidence. It is thus improper to only look at the untainted evidence without considering other factors which affect the jury's verdict such as the magnitude of the error. In the instant case, the Court of Appeals of the State of Washington, Division III, totally ignored the standard promulgated by *Chapman*. By doing so, they failed to reach the merits of petitioners' argument that substantial evidence was errneously introduced at trial in violation of the Fourth Amendment constitutional rights.

The instant case presents an excellent opportunity for the United States Supreme Court to make it clear to lower reviewing courts that it has not abandoned the standard adopted in *Chapman v. California, supra.*

CONCLUSION

For the foregoing reasons, petitioners pray that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Seattle WA 98104

FILE

IN CLERKS OFFICE
COURT OF APPEALS
STATE OF WASHINGTON - DIVISION III
DATE SEP 26 1973
Dale M. Green
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
CHARLES K. NICKELLS and WILLIAM T. PALLIS,
Appellants.

No. 587-III
Division Three

Filed Sep. 26 1973

McINTURFF, J. — Defendants Charles K. Nickells and William T. Pallis were each charged with one count of delivery of a controlled substance on or about June 18, 1971, and possession of a controlled substance on or about June 19, 1971. After a jury trial, which resulted in a verdict of guilty, defendants were sentenced to a maximum term of not more than 5 years in prison on each count, the sentences to run concurrently.

On June 17, 1971 hundreds of people gathered at Deep Lake State Park to attend Sunrise '71 Rock Festival. Undercover narcotic agents were sent to the area to observe possible drug violations. On June 18, 1971 two undercover narcotic agents, Officers Riste and Pidduck, observed defendant Pallis receive money from two persons and hand them tablets. At approximately 9 p.m. that evening Officers Riste and Pidduck made arrangements to purchase 20 hits of mescaline for $25 from defendant Pallis.

At 2:30 a.m. the next morning the officers returned to defendants' campsite; on their arrival they asked for defendant Pallis but were told by defendant Nickells that Pallis was asleep. The officers related to Nickells that they had made arrangements with Pallis to purchase the mescaline for $25. Defendant Nickells agreed to honor the agreement, selling the drugs to the officers, who in turn paid Nickells for the drugs with premarked bills. Thereafter the officers left and turned the drugs over to a chemist, who determined that they were LSD.

At approximately 9 a.m. June 19 Grant County Sheriff's officers ordered everyone in attendance at the Deep Lake campsite to leave the area. Officer Riste was stationed at the gate and when defendants' van passed he identified Nickells. Upon stopping the van the police ordered the defendants and two others who were riding in the rear of the truck, out of the vehicle. Nickells was arrested and searched by Deputy Endicott, who found LSD pills in his pocket. As one of the passengers in the rear of the vehicle alighted therefrom, a film cannister was noticed, opened, and disclosed 18 LSD tablets.

Defendants were placed under arrest and taken to a nearby parking lot where an "inventory" was made of defendants' vehicle. At this time the contents of the truck were surveyed and dumped out on the ground and returned to the truck, but no complete list of items was made. Richard Robinson, an undercover agent, who participated in the inventory, testified that before each item was taken out of the truck he searched thoroughly for drugs. Lieutenant Tom Pratt of the Ellensburg Police Department testified that as the searchers found a "suspected item" they would give it to him to be marked as evidence. Robinson further testified that at this time he took the heater apart "to check the heater for any substance of any nature." He found bills totaling $1,075, including the premarked bills. Thereafter the truck was taken to the sheriff's office and searched again by two off-duty policemen and a stenographer. At this time an inventory list was made.

Prior to trial defendants filed a motion to suppress all evidence arising from their arrest and from the search of their persons and vehicle. The trial court denied the motion; defendants were convicted, and they appeal.

Defendants urge that the trial court erred in denying their motion to suppress the evidence because the warrantless arrest and search were unreasonable and violative of the Fourth Amendment. The state urges the search was proper because: (1) There was probable cause, plus exigent circumstances, which is sufficient justification to allow a warrantless search of an automobile stopped on the highway, in the style of *Chambers v. Maroney*, 399 U.S. 42, 26 L. Ed.2d 419, 90 S. Ct. 1975 (1970); (2) that the evidence was obtained via a valid inventory, as per *State v. Montague*, 73 Wn.2d 381, 438 P.2d 571 (1968); and (3) that the search was proper, it being incident to the arrest.

Assuming, arguendo, that the search of the van truck was violative of the Fourth Amendment, the evidence acquired as a result of the search not being considered by the court, does there remain substantial evidence upon which the defendants could be convicted of the crimes charged?

RE PALLIS — During the evening of June 18, before talking to Pallis, the officers observed a buy of some brown tablets; the tablets looked the same as the ones purchased the next morning. After observing this purchase they talked to Pallis, who stated, "he had a large amount of mescaline and that he usually sold it for $1.50 a hit." At that time Officer Pidduck testified that Pallis agreed to sell them 20 hits for $25, and at 2:30 a.m. the 19th of June the buy was made from Nickells because Pallis was asleep. There is the additional proof that Pallis was in the vehicle at the time of the sale of LSD by, and subsequent arrest of, Nickells. This is adequate proof that Pallis aided and abetted in the sale and possession of LSD under the rule that, "Where two defendants are charged jointly as principals and there is proof that one acted as aider and abettor, by reason of the statute (RCW 9.01.030), the proof will sustain the charge and conviction of both as principals." *State v. McCaskey*, 55 Wn.2d 329, 347 P.2d 895

(1959); *State v. Redden*, 71 Wn.2d 147, 150, 426 P.2d 854 (1967); *State v. Humburgs*, 3 Wn. App. 31, 34, 472 P.2d 416 (1970).

RE NICKELLS — The officers testified that he sold them the 25 hits of LSD at 2:30 a.m. on the 19th, and at the time of arrest LSD tablets were found on his person. More is not needed.

We must now determine whether the introduction of evidence admitted as a result of an unconstitutional search denied defendants a fair trial or amounted to harmless error.

An excellent discussion of that rule is set forth in *State v. Finnegan*, 6 Wn. App. 612, 621-23, 495 P.2d 674 (1972), where this court quoted from *Chapman v. California*, 386 U.S. 18, 17 L. Ed.2d 705, 87 S. Ct. 824 (1967) at page 24, as follows:

> (B)efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard. . . .

Considering the facts in the instant case in light of the *Chapman* principle we must conclude that the introduction of the evidence was harmless. The testimony of the two officers showed clearly the purchase of the drugs and the participation of each defendant. We are left without doubt that the defendants' guilt was conclusively proven by competent evidence.

Finally, defendants contend that the trial court erred in admitting into evidence, over objection, the drugs purchased from defendant Nickells by Officers Pidduck and Riste because the state failed to show a continuous chain of custody as to these items. The evidence indicated both Officers Pidduck and Riste put the drugs they obtained from defendant Nickells in a plastic bag. Each plastic bag had a tag on it which they marked and turned over to chemist Robert Dews. The record, while containing some apparent contradictions,

reflects that the officers at all times could account for the chain of custody if believed by the jury. The question of proper chain of custody due to conflicting testimony was a matter of credibility, which the jury decided adversely to the defendants. This court will not redetermine factual issues. We find no error.

Judgment of the trial court affirmed.

Pursuant to RCW 2.06.040, as amended by Laws of 1971, ch. 41, § 1, p. 63, this opinion will not be published.

WE CONCUR:

Signed:

Green, C. J. McInturff, J.

I CONCUR IN THE RESULT:

Munson, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

APPENDIX B

STATE OF WASHINGTON, Respondent, v. CHARLES K. NICKELLS and WILLIAM T. PALLIS, Appellants.	**REMITTITUR** No. 587-III Grant County No. 3375

Petition for Rehearing denied 10/25/73
Petition for Review denied 1/24/74

The State of Washington to: The Superior Court of the State of Washington in and for Grant County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division III, filed on September 26, 1973, became the final judgment of this court in the above entitled case on January 25, 1974. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

No cost bill having been filed, costs are deemed to have been waived.

CC: James L. Vonasch
Paul Klasen, Prosecuting Attorney for Grant County
Hon. William M. Lowry
Reporter of Decisions
Charles R. Morris, Secretary, Dept. of Social & Health Services
Washington State Board of Prison Terms & Paroles

SEAL

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 25th day of January, A.D. 1974

David A. MacCulloch

Clerk of the Court of Appeals, State of Washington, Division III.